No. 89-977

IN THE

Supreme Court of the United States

OCTOBER TERM 1989

MICHAEL E. BALLARD,
Petitioner,

v.

UNITED STATES,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

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QUESTION PRESENTED FOR REVIEW

Whether the "quick" assessment and collection from a corporate officer by the Internal Revenue Service of a penalty equal to 100% of taxes withheld from employees' wages without a hearing constitutes a deprivation of property contrary to the due process requirement of the Fifth Amendment.

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TO THE HONORABLE, THE CHIEF JUSTICE AND ASSOCIATE JUSTICES OF THE SUPREME COURT OF THE UNITED STATES:

Petitioner, Michael E. Ballard, respectfully prays that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Fourth Circuit entered in this case on September 21, 1989.

OPINIONS BELOW

The opinion of the Court of Appeals for the Fourth Circuit is unpublished (No. 88-1208) and is reproduced at App. 1. The opinion of the United States District Court for the District of Maryland (B-86-1314) is unreported and is reproduced at App. 6.

JURISDICTION

The judgment of the Court of Appeals for the Fourth Circuit was entered on September 21, 1989 (A. 1), and the Petition for Writ of Certiorari was filed within ninety (90) days of that date. This Court's jurisdiction is invoked under 28 U.S.C., Section 1254 (1).

STATUTORY AND CONSTITUTIONAL PROVISIONS

Fifth Amendment to the Constitution of the United States:

AMENDMENT V—CAPITAL CRIMES; DOUBLE JEOPARDY; SELF-INCRIMINATION; DUE PROCESS; JUST COMPENSATION FOR PROPERTY

> No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

Sections 6203, 6671 and 6672 of Title 26, United States Code are reproduced in the Appendix at A.19 through 22.

STATEMENT OF THE CASE

The Petitioner sold his interest in a corporation engaged in the business of repairing automobiles for cash and a note for $25,000, payable in sixty monthly installments. He agreed to pay all taxes through the date of sale, and as he received payments from the purchaser, a portion of each payment was paid to the Internal Revenue Service ("IRS") for that purpose through January of 1981, at which time the Internal Revenue Service directed the purchaser to make the monthly payments directly to it, to be applied to Petitioner's tax liabilities. In late 1982, the purchaser sold the assets of the business, and stopped making payments to the IRS. Petitioner was not advised by the IRS that the payments had stopped.

In March, 1983, the IRS advised Petitioner that limitations were about to run on its right to assess a 100% penalty against him. To avoid immediate assessment of the penalty, Petitioner signed a waiver extending the time during which the tax could be assessed through December 31, 1983. Petitioner unsuccessfully sought to help the IRS locate the assets securing his note. On December 22, 1983, IRS made a "quick" assessment, without a hearing, because the time was running out within which the assessment could be made. Petitioner was sent a cryptic, computerized " notice " advising him that the assessment had been made.

The IRS then notified Petitioner on March 12, 1984 that it "intended to assess a penalty" against him for the corporation's taxes, and advised him that if he did "not agree with the proposed assessment " and appealed his case, he could "do so within thirty (30) days from the date of this letter" and that IRS did not hear from Petitioner "we will have to assess the penalty and bill you." Petitioner replied on March 20, 1984 requesting "a hearing for the matter of the taxes, said

owed by me for Mida Engineers, Inc. for Form 941, period ending 1980." Petitioner pointed out that he "was making monthly payments to IRS" from the payments he was receiving "for the sale of Mida Engineers, Inc. in April, 1980" but that "IRS prefers payment direct from purchaser of business which was Thomas Foster." The IRS received, but ignored, Petitioner's letter, and Petitioner was not granted the hearing he had requested. An IRS employee, in her deposition, stated that Petitioner's request for a hearing was ignored because the 100% penalty had already been assessed in December, 1983.

The IRS filed a tax lien against Petitioner reflecting the 100% penalty imposed upon him, and on July 26, 1985, levied upon a bank account owned by Petitioner. Petitioner paid the amount of the levy to the IRS on August 6, 1985 to obtain a release of the levy on his bank account. A timely claim for refund was filed, after which Petitioner instituted suit in the United States District Court for the District of Maryland for a refund of the taxes, contending that, inter alia, the assessment of the penalty, without providing him notice and an opportunity to be heard, deprived him of his property without due process of law contrary to the provisions of the Fifth Amendment to the Constitution of the United States.

The government admitted that (a) there are no statutory provisions providing for the manner of assessing 100% penalties and (b) limitations already having been extended once by the Petitioner's waiver, he was not given an opportunity to protest the proposed penalty and have a hearing prior to the assessment. Relying upon the authority of *Phillips v. Commissioner*, 283 U.S. 589, 51 S. Ct. 608, 75 L.Ed. 189 (1931) and cases decided by other Courts of Appeal reaching a similar result, the Fourth Circuit held that failure to provide a hearing prior to the assessment of a penalty and collection of the tax did not deprive Petitioner of his right to due process. Citing the *Phillips* decision, this Court in *Boddie v. Connecticut*, 401 U.S. 379, held that "extraordinary situations" justify postponing notice and an opportunity for hearing. In *Fuentes*

v. Shevin, 407 U.S. 67 (1972) it was suggested that (citing *Phillips*) that collection of taxes is one of the exceptions to the requirement of a prior hearing. This Court found in *Phillips* that the statutory scheme, enacted by Congress including those providing for "jeopardy" assessments of taxes, accommodated due process requirements.

Employment withholding and social security taxes are self assessed, and the Internal Revenue Code (Sec. 6203) provides that the 100% penalty is to be assessed in the same manner as the tax to which it relates. Thus, the Internal Revenue Service, whenever limitations are running on its right to make an assessment, assesses such a penalty, with or without a hearing, and in the process of so doing, makes a factual determination that the individual against whom the tax is assessed is (a) a person responsible for paying the tax, and (b) has willfully failed to do so. The government admits in its brief below that there are no "due process" safeguards pertaining to such penalties in the Internal Revenue Code. There is no reason, however, why the assessment of such a penalty like any other tax or penalty ("addition to tax") should not be subject to issuance of a notice of deficiency and a right to review by the Tax Court, prior to payment.

In *Shapiro v. Secretary of State*, 424 U.S. 614, the issue presented by this Petition was anticipated by the Court in the following passage:

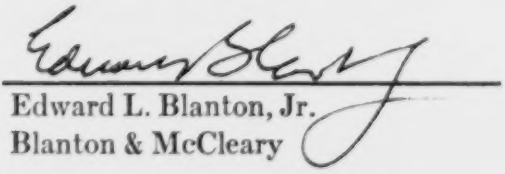
> ". . . Thus, insofar as Phillips may be said to have sustained the constitutionality of the Anti-Injunction Act, as applied to a jeopardy assessment and consequent levy on a taxpayer's assets without prompt opportunity for final resolution of the question of his liability by the Tax Court, it did so only by way of dicta. The dicta were carefully expressed . . ." Id. p. 631.

The year previous, in *Laing v. United States*, 423 U.S. 161, 46 L.Ed 2d 416 (1976) also involving jeopardy assessments, this Court reserved the question of the constitutionality of procedures identical to those involved in this Petition by con-

struing "deficiency" broadly enough to include an amount owing for a termination period. *Id.* p. 183, n. 26. Equally compelling arguments exist for extending to corporate officers the same due process protection offered the class of taxpayers at which the jeopardy assessment provisions are directed. When such taxpayers are required to pay a tax, and file a claim for refund, there is an automatic, minimum deprivation of at least eight (8) months. Due to the realities of litigation in the Federal Courts the actual deprivation is longer. In this case, it took almost three years for Petitioner, after paying the tax in August, 1985, to get a decision in a refund suit from the District Court, on his Motion for Summary Judgment, in July, 1988.

The Supreme Court is requested to issue a Writ of Certiorari to the U.S. Court of Apepals for the Fourth Circuit to review and consider whether the assessment and collection of such penalties without any hearing, violates the due process safeguards guaranteed by the Fifth Amendment to the Constitution of the United States.

Respectfully submitted,



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APPENDIX

United States Court of Appeals for the Fourth Circuit

No. 88-1308

Michael E. Ballard

Plaintiff-Appellant

v.

United States of America

Defendant-Appellee

Appeal from the United States District Court for the District of Maryland, at Baltimore

Walter E. Black, Jr., District Court Judge
(C/A-86-1314)

Argued: May 8, 1989 *Decided: September 21, 1989*

Before ERVIN, Chief Judge, CHAPMAN, Circuit Judge, and KAUFMAN, Senior United States District Judge for the District of Maryland, sitting by designation.

Edward L. Blanton, Jr., (Blanton & McCleary on brief) for Appellant. William L. Estabrook (William S. Rose, Jr., Assistant Attorney General; Gary R. Allen, Jane S. Kimball, Tax Division, Department of Justice; Breckinridge L. Willcox, United States Attorney on brief) for Appellee.

PER CURIAM:

At all relevant times up until and including April 1, 1980, Ballard was the sole stockholder and president of Mida Engineers, Inc. ("Mida"). Mida failed timely to pay, as required, FICA and federal withholding taxes for several quarters in 1978, 1979 and 1980. On March 19, 1980, Ballard and Thomas E. Foster, III entered into an agreement pursuant to which Ballard sold to Foster all of the shares of Mida stock for $55,000—$30,000 in cash at the time of settlement on April 1, 1980 and $25,000 by way of a promissory note payable with interest in sixty monthly installments of $537.38.

On May 1, 1980, Mida forwarded its check to the Internal Revenue Service ("IRS") for the unpaid balance of FICA and withholding taxes for the first calendar quarter of 1980. However, that check was returned by the drawee bank for insufficient funds. The IRS then levied upon the monthly note payments from Foster to Ballard, and apparently applied all or some of those payments to certain 1974 and 1975 federal tax liabilities of Ballard and to certain of Mida's withholding tax liability.

In 1982, Foster sold his interest in Mida and stopped making payments on his note to Ballard. At that time, there was still unpaid to the IRS withholding taxes for Mida for part of the first calendar quarter of 1980 and the third quarter of 1979. The taxes due for the second quarter of 1978 and the second and fourth quarters of 1979 had by then been paid in full. In March, 1983, the IRS discussed with Ballard his responsibility for collection and payment of Mida withholding taxes, and in a March 25, 1983 letter indicated that the assessment of a 100% penalty for such taxes would be made pursuant to Section 6672 of the International Revenue Code

("Code").[1] On March 28, 1983, Ballard signed a waiver extending until December 31, 1983, the statutory period for assessment by the IRS of the 100% penalty.

On December 22, 1983, the IRS made an assessment against Ballard for the third quarter of 1979 and the first quarter of 1980 in the amount of $7,110.53 with respect to unpaid Mida withholding taxes. On that same date, the IRS sent to Ballard a notice of that assessment and a demand for payment. Notwithstanding the December, 1983 assessment, the IRS sent a letter to Ballard on March 12, 1984 referring to the March 25, 1983 proposed assessment and requesting Ballard to sign and return an enclosed form if he agreed with the proposal. That letter also notified Ballard of his opportunity to appeal administratively if he disagreed with the assessment. Ballard responded on March 20, 1984 with a letter protesting the assessment and requesting an administrative hearing. In response, the IRS informed Ballard on June 27, 1984 that the assessment had already been made and could not be administratively appealed.

Without holding a hearing, the IRS, on July 26, 1985, levied upon Ballard's bank account. On August 1, 1985, the IRS released that levy after Ballard provided information to the IRS of Ballard's inability to pay the amount. Then, on August 6, 1988, Ballard paid $8,584.54 to the IRS as a payment in full of the 100% penalty assessment, accrued interest, fees and

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[1] That section provides in pertinent part:

> Any person required to collect, truthfully account for, and pay over any tax imposed by this title who willfully fails to collect such tax, or truthfully account for and pay over such tax, or willfully attempts in any manner to evade or defeat any such tax or the payment thereof, shall, in addition to other penalties provided by law, be liable to a penalty equal to the total amount of the tax evaded, or not collected, or not accounted for and paid over. No penalty shall be imposed under section 6653 for any offense to which this section is applicable.

costs. On September 16, 1985, Ballard filed a refund claim with the IRS, and after the IRS failed to act upon that claim, instituted his refund claim in the District Court. After the District Court granted summary judgment denying Ballard's refund claim, Ballard filed this appeal. We affirm.

I.

In the District Court, Ballard, although conceding his responsibiilty for payment of the Mida withholding taxes relating to the period prior to March 19, 1980, the date of the sale by Ballard to Foster of Ballard's interest in Mida, denied any responsibility for such taxes with respect to the March 19, 1980 through April 1, 1980 period. Ballard, in the District Counrt, also claimed that he had been deprived of due process because the assessment and the levy upon his bank account had occurred without any hearing and that the IRS had failed to afford to him the administrative hearing which the IRS had seemingly promised. Finally Ballard, in the District Court, contested the amount of the assessment. That last issue was settled by Ballard and the IRS. As to all other issues, Judge Black ruled in favor of the IRS.

II.

Ballard states in his brief that the following single issue is presented:

> Whether a "jeopardy" assessment and subsequent collection of a 100% penalty from a taxpayer after he had voluntarily extend the period within which such an assessment could be made, without a hearing requested by the taxpayer, was a deprivation of property contrary to the Fifth Amendment to the Constitution of the United States."[2]

[2] Thus, in this Court, Ballard has not pursued any contention relating to his responsibility for the March 19, 1980 through April 1, 1980 period.

Appellant mischaracterizes the behavior of the IRS. Instead of a "jeopardy" assessment pursuant to 26 U.S.C. §§ 6861, 6331, and 6213, the IRS made what it terms a "quick" assessment of a 100% penalty for employer withholding taxes due, pursuant to section 6672. "Assessments under Section 6672 may be collected without a prior judicial hearing." *Cohn v. United States*, 399 F. Supp. 168, 170 (E.D.N.Y. 1975). *See also Boynton v. United States*, 566 F.2d 50, 53 (9th Cir. 1977); *Kalb v. United States*, 505 F.2d 506, 510 (2d Cir. 1974), *cert. denied*, 421 U.S. 979 (1975).

26 U.S.C. § 6203 provides the IRS with the method for making tax assessments for sums owed by a taxpayer, including penalties, and enables, with notice and demand and the subsequent refusal of the taxpayer to pay, the enforcement of such a penalty by a levy pursuant to 26 U.S.C. § 6331. *United States v. Chila*, 871 F.2d 1015 (11th Cir. 1989); *Boynton, supra.*

Because Ballard had been afforded notice and demand prior to the assessment and subsequent levy, he was not deprived of due process; indeed, he was afforded the opportunity to file, and in fact filed, this refund action in federal district court. *See Boynton, supra. Cf. Laing v. United States*, 423 U.S. 161 (1976); *Clark v. Campbell*, 501 F.2d 108 (5th Cir. 1974), *cert. denied*, 423 U.S. 1091 (1976); *Schreck v. United States*, 301 F. Supp. 1265 (D. Md. 1969).

In addition to his other claims of error by the District Court, Ballard points to the alleged failure of the IRS to follow the provisions of its own procedural manual and afford Ballard a hearing. But such failure, if it did occur, does not constitute a denial of due process rights. *Luhring v. Glotzbach*, 304 F.2d 560 (4th Cir. 1962); *United States v. Horne*, 714 F.2d 206 (1st Cir. 1983).

For those reasons, Ballard's appeal is without merit.

AFFIRMED

United States District Court
District of Maryland

Case No. 86-1314

Baltimore, Maryland
June, 1989

THE CLERK: The matter now attending before the Court, Civil Docket Number B86-1314, Michael E. Ballard versus United States of America.

THE COURT: Counsel, thank you for coming in today to do it this way. It dawned on me that having gotten into it and having made the conclusions I needed to make, the quickest way to get things moving was to get you all in, rather than sti back in chambers polish this thing so I can give it to you in writing. So I will—I will rule on the pending matters by means of an informal oral opinion, reserving the right to edit that opinion if it is transcribed for any reason.

This is an action to recover a refund from taxes, which the Internal Revenue Service assessed and collected from the Plaintiff, Michael E. Ballard. Presently pending before the Court are Plaintiff's motion for summary judgment, paper 12, Defendant's motion for summary judgment, paper 14, and Defendant's motion to permit the service of an untimely response to Plaintiff's supplemental request for admissions of fact and genuineness of documents.

Ballard was the sole stockholder and president of Mida Engineers, Inc. Mida was delinquent in paying its FICA and

withholding tax liability for several quarters in 1978, '79 and '80. On March 19, 1980, Ballard tendered an agreement to sell all of Mida stock to Thomas E. Foster, III. The agreement provided that settlement would occur on April 1, 1980. On May 1, 1980, Mida issued a check to the IRS for the unpaid balance of tax liability for the first quarter of 1980, but the check was returned by—for insufficient funds.

The consideration for the sale of Mida stock to Foster was $55,000, 30,000 in cash and the remainder in 16 monthly payments, pursuant to a promissory note date April 1, 1980. The IRS levied on this note and Foster's payments were applied to the unpaid balance of Ballard's 1974 and 1975 income tax liabilities.

In 1982, however, Foster sold Mida and stopped making payments to the IRS under the promissory note. The Mida equipment subject to the IRS lien, and which was Ballard's security for the promissory note, was removed by Foster and cannot be found.

In March of 1983 the IRS communicated with Ballard and proposed that a hundred percent penalty be assessed against Ballard for Mida's unpaid withholding taxes. On March 25, 1983, in exchange for deferring on immediate assessment of the penalty, Ballard signed a waiver extending the statutory period for the assessment of the penalty against him to December 31, 1983.

On December 22nd, 1983, the IRS made an assessment of a hundred percent penalty for the unpaid withholding taxes of Mida for the third quarter of 1979 and the first quarter of 1980, totaling $7,110.53. On that same date the IRS forwarded a notice of the assessment to Ballard with a request for the payment.

On March 12, 1984, although the IRS had already assessed a penalty against Ballard and requested payment, the IRS notified Ballard that intended to assess a penalty against him.

This letter also stated that Ballard could appeal the proposed assessment within 30 days. Ballard responded by letter on March 20, 1984, in which he requested a hearing. On June—on June 27, 1984, an IRS representative called Ballard and advised him that he could not appeal the 100 percent penalty assessment.

On July 26th, 1984, the IRS levied on Ballard's bank account. On August 6th, 1985, Ballard paid $8,584.54 to the IRS for the 100 percent penalty assessment, accrued interest, fees and costs, to secure a release of the tax lien filed pursuant to th assessment. On September 16th, 1985, Ballard filed a claim for refund with the IRS, and on April 28, 1986, filed a complaint in this Court.

As a result of the parties cross motions for summary judgment, the following—issues are presently before the Court. One, was Ballard a responsible person who wilfully failed to pay over taxes Mida withheld from its employees for the period of March 19, 1980 to April 1, 1980? Two, was Ballard entitled to a hearing and a more detailed notice and demand prior to the collection of the 100 percent penalty? Three, did the IRS fraudulently induce Ballard to sign a waiver extending the statutory period for assessment? And four, did the IRS allocate certain tax payments to Ballard's income tax liabilities for 1974 and 1975, and to Mida's withholding tax liability for fourth quarter, 1979, when such liabilities had been paid in full, And accordingly, were such payments properly allocable to Mida's withholding tax liabilities for third quarter, 1979, and first quarter, 1980? The Court will address each of these issues in turn.

Ballard contends that he was not responsible for Mida's employment taxes after March 19, 1980, conceding that he is responsible prior to that date. He alleges that the March 19, 1980 sale to Foster made Foster the responsible person for the remainder of the first quarter.

Pursuant to Section 3402 of the Internal Revenue Code, employers must deduct and withhold a specific percentage of wages paid to an employee. These funds must be turned over to the IRS at least by the last day of the first calendar month following the end of each quarter, 26 CFR Section 31.6071 (A) (1), unless the aggregate amount of withholding taxes had exceeded $200 at the end of the month. If they do, 26 CFR Section 31.6302 (C) (1) requires the money to be deposited with an authorized financial institution within 15 days of the month end, or, if the quarter ended, within a month. These funds are not merely a debt of the employer. They're held in trust for the United States, *Maggy v. United States*, 560 F.2nd, 1372, Ninth Circuit, 1977, cert. denied 439 US 821, 1978.

Section 6672 of the Code is an enforcing mechanism with respect to the payment of withholding taxes. It imposes duty on those connected with an employer who should have seen to it that the withholding taxes were paid. The statute imposes a penalty upon any officer or employee who wilfully fails to collect, truthfully account for and pay over such taxes. A person is a responsible person under Section 6671 (B) if he has a duty to perform any of these functions, collecting, accounting or paying over. A person need not be, quote, in a position to perform all three of the enumerated duties with respect to the tax dollars in question, *Slodov v. United States*, 436 US 238 at 250, 1978.

The willfulness requirement is satisfied, quote, if the responsible person acts with a reckless disregard of a known or obvious risk that trust funds may not be remitted to the Government, *Mazo v. United States*, 591 F 2nd, 1151 at 1154, Fifth Circuit, cert. denied, 444 US 842, 1979. See, for example, *Teel v. United States*, 529 F 2nd 903 at 905, Ninth Circuit, 1975. A voluntary, conscious and intentional act, such as payment of other creditors in preference to the United States may demonstrate willfulness, *Brown v. United States*, 591 F 2nd

1136 at 1140, Fifth Circuit, 1979. The burden of proving lack of willfulness is on the taxpayer, citing *Brown* again at page 1140.

There is no question that Ballard was a responsible person at Mida who wilfully failed to pay over employment taxes, at least until March 19, 1980. He was sole stockholder and president. He admitted in his deposition that he paid employees and other Mida creditors while employment taxes were not turned over to the Government. The point of contention is whether Ballard remained a responsible person after he signed an agreement to transfer the Mida stock to Foster on March 19, 1980.

The March 19 agreement of sale and promissory note are persuasive evidence that Ballard did not relinquish control of Mida on March 19, 1980. First, the agreement of sale, although entered into on March 19, designated the settlement date as April 1, 1980. Second, the payment terms reflect Ballard's retention of Mida past March 19. The agreement of sale required Foster to pay only $3,000 on March 19th, as opposed to $27,000 on the April 1 settlement date. It seems highly unlikely that Ballard intended to surrender all of his interest and control over Mida for $3,000 of the $55,000 purchase price. Third, the agreement provided that all work commenced prior to April 1 and accounts receivable at Mida prior to April 1 would remain the property of Ballard. Lastly and most importantly, Ballard warranted that but for one debt owed to a private creditor, there would be no outstanding debts owed by Mida by April 1. This warranty indicates that with the exception of one debt, all other Mida debts accruing before April 1, which necessarily includes employment taxes, would be Ballard's responsibility.

Ballard contends that Foster filled out an employer's quarterly tax return on May 1 for the first quarter of 1980 and mailed a check to the Government. That check was later returned by Mida's bank for insufficient funds. Ballard asserts that these documents signed by Foster evidence that it was

Foster, not Ballard, who was responsible for the unpaid withholding taxes of the first quarter.

There's nothing in the record to establish that it was Foster who filled out the May 1 return and signed the bad check. In fact, Foster has submitted an affidavit saying he did not sign the employment tax return and accompanying check for the first quarter of 1980. On the other hand, the agreement of sale provides probative evidence of Ballard's continued involvement with Mida past March 19. Unsubstantiated allegations that Foster submitted a return and a check for the first quarter of 1980 do not convince the Court otherwise.

Furthermore, even if this were regarded as a disputed issue of fact, it does not affect the Court's ruling on this issue, since the fact that Foster may also be liable as a responsible person who wilfully failed to pay over withheld taxes does not exonerate Ballard for failing to pay. Liability under Section 6672 is joint and several, citing *Brown* again at 1142. The Code does not limit the IRS to, quote, the most responsible person, quote, for a 6672 penalty, but to all persons who fulfill the definition of being a responsible person, *Ackerman v. United States,* 56 AFTR 2nd. 5069 at 5073, Central District, California, 1985.

The inquiry does not stop, however, with a determination that Ballard was a responsible person past March 19th. He is liable under Section 6672 only if he wilfully failed to insure that the withholding taxes are paid. Ballard has a burden of proving to the Court that he did not act with a reckless disregard to whether the withholding taxes were turned over to the Government.

This he has not done. The record shows that Ballard had often paid other creditors, although his employment tax liability was accruing. This is sufficient to demonstrate willfulness. See *Ackerman* at page 5072. Furthermore,, Foster asserts in his affidavit that there were no funds available to pay employ-

ment taxes when Ballard turned over the Mida operations in April. Ballard has offered no proof to dispute this assertion other than his bald assertions to the contrary. The Court does conclude that Ballard was a responsible person for the entire first quarter of 1980, and that he wilfully failed to ensure that the employment taxes were paid to the Government.

Implicit in this discussion is the Court's resolution of an aspect of the Government's motion to permit the service of untimely response to Plaintiff's supplemental request for admissions of fact and genuineness of documents. The disputed admission by the Government, upon which the Plaintiff has relied, involves the check alleged—allegedly signed by Mr. Foster on May 1 that accompanied Mida's quarterly tax return for the first quarter of 1980. The Government did not respond to Plaintiff's supplemental request for admissions, thereby admitting that Foster sent the May 1 check. The Government now seeks to respond to the request by admitting the statement, except to assert that the IRS had no way to determine who in fact signed the check.

Under Rule 36(B) of the Federal Rules of Civil Procedure, the Court may permit the withdrawal or amendment of an admission. In the present case, the Government was not in a position to state with certainty who signed the check in question at the time the request for admission was served. Furthermore, the Government's delay does not hinder Ballard's ability to prove who did sign the check. He has not demonstrated an appreciable prejudice that would persuade the Court to disallow the Government's untimely response. In any event, as previously stated, the factual—factual dispute involved here does not affect the Court's ruling on this issue.

Ballard's next argument is that the levy upon his bank account was invalid because the IRS deprived him of his fundamental right to due process under the Fifth Amendment to the United States Constitution. More specifically, Ballard states that he should have been afforded a hearing before the

assessment, and that the actual notice and demand he received were—was inadequate.

A taxpayer in not entitled to a hearing prior to assessment when judicial review his afforded after the assessment, *Kalb v. United States*, 505 F 2nd 506 at 510, Second Circuit, 1974, cert. denied, 421 US 979, 1975, citing *Phillips v. Commissioner*, 283 US 589 at 595, 1931. In *Kalb*, the Court rejected the argument that due process was violated when the taxpayer was not afforded a hearing prior to the hundred percent penalty assessment. The judicial review, which Ballard has received, satisfies the requirements of due process.

The notice and demand sent to Ballard also satisfied due process. A notice and demand was sent to Ballard on the date of the assessment. Printed on a standard form, Form 6335, the notice identified the taxpayer, his mailing address, the period involved, the balance due and the statutory basis for the assessment, Section 6—672, IRC, 1954. The form clearly states, statement of tax due IRS, and, please return this copy with your payment. The for sufficiently notified Ballard of his obligation. See *Allan v. United States*, 386 F. Supp. 499 and 503, Northern District of Texas. Although notice and demand listed incorrect name of employer corporation, the notice gave the correct dates and amounts due, thereby obligating taxpayer under Section 6672, affirmed 514 F. 2nd 1070, Fifth Circuit, 1975.

Ballard contends that Congress provided a notice and demand procedure for certain types of taxes and penalties which do not fall into the income, estate, gift and excise tax categories, for which a notice of deficiency followed by a hearing is the prescribed procedure. Ballard states that the hundred percent penalty assessment requires adherence to a notice and demand procedure. Consequently, he argues that he should have received notice, not only prior to the collection of the penalty, but also prior to assessment.

Section 5212 (A) of the Internal Revenue Code provides for a notice of deficiency prior to the assessment of an unpaid tax. Section 6212 (A) applies, however, to taxes imposed under subtitles A and B of the code. Withholding taxes are imposed under subtitle C of the code. Therefore, the, quote, notice provisions of Section 6212 and 6213 do not apply to the assessment of withholding taxes, *Jacobson v. Organized Crime and Racketeering Section*, 403 F. Supp. 1332 at 1336, Eastern District of New York, 1975, affirmed 554 F. 2nd 637, Second Circuit, 1976, cert. denied 430 US 955, 1977.

Although Ballard relies on the decision *Laing v. United States* 423 US 161 1976 *Laing* does not further Ballard's argument. In *Laing* taxpayers challenged the collection of assessments imposed following jeopardy terminations. A jeopardy termination imposed pursuant to Section 6851 (A) (1) of the Internal Revenue Code permits an accelerated termination of a taxpayers taxable period of if the IRS determines that the taxpayer intends to commit an act tending to prejudice or render ineffectual the collection of his income tax. The IRS levied upon the taxpayer's property without sending a notice of deficiency as required by Section 6861 of the Code. A Section 6861 notice is a jurisdictional prerequisite to a taxpayer's suit in the Tax Court. The Supreme Court held that the income tax jeopardy assessment of Section 6851 was a deficiency which triggered the notice of deficiency requirement in Section 6861.

Laing is inapplicable to the present action. The procedures required of the Government in the collection of income tax are not imposed on the collection of a hundred percent penalty for failure to pay withholding taxes. The statutory sections involved in *Laing* dealt with income taxes, not with withholding taxes, and are therefore inapplicable to the present case. See *Jacobson*, 544 F. 2nd at 639. Ballard's due process argument is without merit.

Ballard contends that the assessment as to the third quarter of 1979 was not timely, because the waiver he signed on March

25, 1983, extending the penalty assessment period to December 31, 1983, was fraudulently induced. He states that he—it was executed with the expectation that he would receive a hearing before there was any levy upon his assets. Because he did not receive a hearing he seeks to have the waiver nullified.

Ballard signed the waiver because he was told that there would be an immediate assessment if he did not sign it. He was not promised a hearing in exchange for the waiver. The waiver form itself does not contain any promises. Without a written promise it is immaterial that the taxpayer expects such a hearing. A, quote, consent is valid where no hearing is held, even though a taxpayer expects such review, *Houlberg v. Commissioner*, 54 TCM, PH, paragraph 85-497, 1985. And see also *Ravin v. Commissioner*, 50 TCM, PH, paragraph 81-107, 1981, where a Revenue agent cannot a bind the Commissioner. Without a written condition in the waiver, IRS was not obliged to grant a hearing.

Thus, there are no grounds for invalidating Plaintiff's March 28, 1983 waiver.

Plaintiff contends that in the past tax payments have been made to the IRS and applied by the IR—IRS to his income tax liabilities for 1974 and 1975 and to Mida's withholding tax liability for fourth quarter, 1979, when they were properly allocable to Mida's withholding tax liabilities for third quarter of 1979 and first quarter of 1980, or his hundred percent penalty assessment directly related thereto. Specifically, Plaintiff directs to the Court's attention—directs the Court's attention to a series of monthly payments made by Foster in 1981 and 1982, all of which were allocated to Ballard's 1974 or 1975 income tax liability. Plaintiff asserts that these payments exceeded the amount due, and at least a portion of these payments should have been allocated to his hundred percent penalty assessment.

Plaintiff also asserts that on March 2, 1981, the IRS accepted a check in the amount of $389.27 from Mida, all of

which was applied to Mida's withholding tax liability for fourth quarter of 1979, which had already been fully paid. Plaintiff further asserts that this payment should have been applied against Mida's withholding taxes for third quarter of 1979, thereby reducing his obligation on his hundred percent penalty assessment.

In response, the IRS asserts that neither Ballard's 1974 and 1975 income tax liabilities nor Mida's fourth quarter of 1979 withholding tax liabilities were, in fact, overpaid, because of the penalties and interest applicable to these liabilities. The Court is unable to determine from the record in this case which party is correct and the conclusions reached. However, a disputed issue of fact is not involved since the record reflects, albeit in an—in an incomprehensible manner, the exact status of all tax obligations, receipts, and the allegation—allocation of such receipts. At oral argument on the pending motions, counsel proffered to the Court that the accounting computations could be made without participation by the Court. Accordingly, the Court will reserve its decision as to whether the Plaintiff did, in fact, overpay his 1974 and 1975 income taxes, and whether Mida's withholding tax for fourth quarter of 1979 was overpaid.

The IRS further asserts that the Plaintiff's attempts to obtain proper credit for tax payments made, and to establish his entitlement for refunds as a result of these improper credits, are not timely. Section 6511 of the Code provides that a claim for refund or credit of any tax on which the taxpayer is required to file a return shall be filed by the taxpayer within three years from the time the return was filed, or two years from the time the tax was paid, whichever of such periods expired the later. The Government's position is that the tax periods involved and the dates of payment set forth above were beyond the period of limitations, since the claims for refund on which this action is based were filed on September 16, 1985. However, the Court finds that the focus of its attention is more properly the payment on August 5, 1985, of

$8,584.54, which is the subject of the claim for refund. This payment was clearly within the period of limitations, and even if certain prior tax payments were erroneously credited to the wrong account, this would not affect Ballard's entitlement for any refund as a result of which the IRS has been overpaid.

Accordingly the Court finds that Ballard's entitlement to a refund is not barred by limitations. Whether any refunds is appropriate under the circumstances of this case must await the preparation and submission of an accounting by the parties.

The Court finds no genuine issue as to any material fact. The Court grants the Government's motion to permit an untimely response to Plaintiff's supplemental request for admissions of fact and genuineness of documents. The Court will reserve the entry of any order on the Plaintiff's and Defendant's motions for summary judgment until the Government's liability to Ballard, if any, is agreed upon by the parties or is established by further proceedings.

Counsel, I will enter a marginal order on the one motion I have ruled on.

* * *

In The United States District Court for the District of Maryland

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Civil No. B-86-1314

Michael E. Ballard

v.

United States of America

ORDER AND FINAL JUDGMENT

Presently pending in the above-captioned case are plaintiff's motion for summary judgment (Paper 12) and defendant's motion for summary judgment (Paper 14). The issues raised by the motions have been fully briefed, and the Court has had the benefit of oral argument presented on behalf of the parties at a hearing held on August 21, 1987.

The Court rendered an oral opinion on June 1, 1988, but reserved ruling on the issue as to the amount of tax refund, if any, that is owed the plaintiff by the defendant. The Court urged the parties to confer on the issue and advise the Court whether further proceedings were necessary. On July 5, 1988, the parties notified the Court by letter that they had resolved the remaining issue in the case and that judgment may be entered for the defendant on the refund claim.

In accordance with the Court's oral opinion and rulings rendered on June 1, 1988, IT IS, this *12th* day of July, 1988, by the United States District Court for the District of Maryland,

ORDERED:

(1) That plaintiff's Motion for Summary Judgment (Paper 12) BE, and the same hereby IS, DENIED;

(2) That defendant's Motion for Summary Judgment (Paper 14) BE, and the same hereby IS, GRANTED;

(3) That judgment BE, and the same hereby IS, ENTERED in favor of the United States of America against Michael E. Ballard; and

(4) That the Clerk shall mail a copy of this Order forthwith to counsel of record.

WALTER E. BLACK, JR.
United States District Judge

STATUTES

§ 6203. Method of assessment

The assessment shall be made by recording the liability of the taxpayer in the office of the Secretary in accordance with rules or regulations prescribed by the Secretary. Upon request of the taxpayer, the Secretary shall furnish the taxpayer a copy of the record of the assessment.

§ 6671. Rules for application of assessable penarties

(a) Penalty assessed as tax.—The penalties and liabilities provided by this subchapter shall be paid upon notice and demand by the Secretary, and shall be assessed and collected in the same manner as taxes. Except as otherwise provided, any reference in this title to "tax" imposed by this title shall be deemed also to refer to the penalties and liabilities provided by this subchapter.

(b) Person defined.—The term "person", as used in this subchapter, includes an officer or employee of a corporation, or a member or employee of a partnership, who as such officer, employee, or member is under a duty to perform the act in respect of which the violation occurs.

§ 6672. Failure to collect and pay over tax, or attempt to evade or defeat tax

(a) General rule.—Any person required to collect, truthfully account for, and pay over any tax imposed by this title who willfully fails to collect such tax, or truthfully account for and pay over such tax, or willfully attempts in any manner to evade or defeat any such tax or the payment thereof, shall, in addition to other penalties provided by law, be liable to a penalty equal to the total amount of the tax evaded, or not collected, or not accounted for and paid over. No penalty shall be imposed under section 6653 for any offense to which this section is applicable.

(b) Extension of period of collection where bond is filed.—

(1) In general.—If, within 30 days after the day on which notice and demand of any penalty under subsection (a) is made against any person, such person—

(A) pays an amount which is not less than the minimum amount required to commence a proceeding in court with respect to his liability for such penalty,

(B) files a claim for refund of the amount so paid, and

(C) furnishes a bond which meets the requirements of paragraph (3),

no levy or proceeding in court for the collection of the remainder of such penalty shall be made, begun, or prosecuted until a final resolution of a proceeding begun as pro-

vided in paragraph (2). Notwithstanding the provisions of section 7421(a), the beginning of such proceeding or levy during the time such prohibition is in force may be enjoined by a proceeding in the proper court.

(2) Suit must be brought to determine liability for penalty.—If, within 30 days after the day on which his claim for refund with respect to any penalty under subsection (a) is denied, the person described in paragraph (1) fails to begin a proceeding in the appropriate United States district court (or in the Court of claims) for the determination of his liability for such penalty, paragraph (1) shall cease to apply with respect to such penalty, effective on the day following the close of the 30-day period referred to in this paragraph.

(3) Bond.—The bond referred to in paragraph (1) shall be in such form and with such sureties as the Secretary may by regulations prescribe and shall be in an amount equal to 1½ times the amount of excess of the penalty assessed over the payment described in paragraph (1).

(4) Suspension of running of period of limitations on collection.—The running of the period of limitations provided in section 6502 on the collection by levy or by a proceeding in court in respect of any penalty described in paragraph (1) shall be suspended for the period during which the Secretary is prohibited from collecting by levy or a proceeding in court.

(5) Jeopardy collection.—If the Secretary makes a finding that the collection of the penalty is in jeopardy, nothing in this subsection shall prevent the immediate collection of such penalty.

No. 89-977

In the Supreme Court of the United States

OCTOBER TERM, 1989

MICHAEL E. BALLARD, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTION PRESENTED

Whether the Due Process Clause requires that a responsible person receive a hearing prior to the assessment of his personal liability under 26 U.S.C. 6672 for willfully failing to pay over withholding taxes to the government.

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In the Supreme Court of the United States

OCTOBER TERM, 1989

No. 89-977

MICHAEL E. BALLARD, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. A1-A5) is unpublished, but the decision is noted at 887 F.2d 1078 (Table). The opinion and order of the district court (Pet. App. A6-A19) are unreported.

JURISDICTION

The judgment of the court of appeals was entered on September 21, 1989. The petition for a writ of certiorari was filed on December 20, 1989. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. At all relevant times until April 1, 1980, petitioner was the sole stockholder and president of Mida Engineers,

Inc. Mida failed to pay timely FICA and federal withholding taxes for several quarters in 1978, 1979, and 1980. On April 1, 1980, petitioner sold Mida to Thomas Foster for $30,000 in cash and a $25,000 promissory note, payable, with interest, in 60 monthly installments. On May 1, 1980, Mida sent a check to the IRS for its FICA and withholding payments for the first quarter of 1980. That check was returned by the bank because of insufficient funds. The IRS then levied upon the monthly payments from Foster to petitioner, and it applied them to petitioner's 1974 and 1975 individual tax liabilities and to Mida's withholding tax liability. Pet. App. A2.

In 1982, Foster sold Mida and stopped paying petitioner. At that time, withholding taxes were still outstanding for Mida for the third quarter of 1979 and part of the first quarter of 1980. The IRS discussed petitioner's liability for these taxes with him in March 1983. In a letter dated March 25, 1983, the IRS indicated that petitioner would be assessed the responsible officer penalty for these taxes, pursuant to Section 6672 of the Internal Revenue Code.[1] On March 28, 1983, petitioner signed a waiver extending until December 31, 1983, the time for the IRS to assess the Section 6672 liability against him. Pet. App. A2-A3.

On December 22, 1983, the IRS made an assessment against petitioner for $7,111 for Mida's withholding taxes for the third quarter of 1979 and the first quarter of 1980. On the same day, the IRS sent petitioner a notice of assessment and demand for payment. Petitioner did not pay the assessed taxes.[2] On July 26, 1985, the IRS levied upon

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[1] Unless otherwise noted, all statutory references are to the Internal Revenue Code of 1954 (26 U.S.C.), as amended (the Code or I.R.C.).

[2] On March 12, 1984, notwithstanding the fact that the assessment already had been made, the IRS sent petitioner a standard letter that referred to the March 1983 proposed assessment. This letter, which is

petitioner's bank account. On August 1, 1985, the IRS released the levy upon receiving information from petitioner of his inability to pay the assessed taxes. On August 6, 1985, petitioner paid $8,585 in taxes, interest, fees, and costs.[3] Pet. App. A3-A4.

2. After the IRS failed to act upon his administrative refund claim within six months, petitioner brought this refund suit in the United States District Court for the District of Maryland. Ruling from the bench, the district court granted summary judgment in favor of the IRS (Pet. App. A6-A19). The court found that petitioner was a responsible person of Mida and had willfully failed to pay over its withholding taxes to the United States (*id.* at A10-A12). The court also ruled that petitioner's due process rights were not violated when the IRS assessed the taxes against him without affording him a prior hearing (*id.* at A13-A14). The court explained that the Code provisions requiring that a notice of deficiency be sent to a taxpayer do not apply to responsible officer penalties imposed under Section 6672, and it noted that petitioner properly was sent a notice of assessment and demand for payment (Pet. App. A13-A14). The

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normally sent under IRS procedures before the assessment is made (subject to statute of limitations considerations), asked petitioner to sign the enclosed form if he agreed with the proposed assessment and stated that, alternatively, petitioner could appeal the proposed assessment administratively. On March 20, 1984, petitioner sent a letter requesting an administrative hearing. On June 27, 1984, the IRS denied petitioner's request, stating that the assessment had already been made. Pet. App. A3.

[3] Petitioner paid this amount voluntarily in order to obtain a release of the federal tax lien, notice of which had been filed against him. See Pet. App. A8. Contrary to petitioner's suggestion (Pet. 4), petitioner was not forced to make the payment to release the government's levy upon his bank account. The IRS had released that levy five days earlier, based upon petitioner's assertion that he was unable to pay the assessed tax liability. Pet. App. A3.

court also explained that it is well established that a taxpayer's right to post-assessment judicial review satisfies due process (*id.* at A13).

The court of appeals affirmed (Pet. App. A1-A5). The court stated that there is no right to a judicial hearing before collection of a Section 6672 assessment (Pet. App. A5). The court further explained that there is no constitutional infirmity in the procedure established by Congress for the assessment and collection of Section 6672 liabilities (Pet. App. A5): "Because [petitioner] had been afforded notice and demand prior to the assessment and subsequent levy, he was not deprived of due process; indeed, he was afforded the opportunity to file, and in fact filed, this refund action in federal district court."

ARGUMENT

Petitioner contends (Pet. 5-6) that the system established by Congress for assessing and collecting Section 6672 liabilities violates due process because it fails to provide an opportunity for a pre-assessment judicial hearing. This contention uniformly has been rejected by every court of appeals that has considered it, and their conclusion is fully consistent with the decisions of this Court. Accordingly, there is no reason for further review.

1. This Court has long recognized the reasonableness of the general requirement of our tax system that taxpayers first pay their taxes before contesting their tax liability in a judicial forum. In *Cheatham* v. *United States*, 92 U.S. 85, 89 (1876), the Court noted that Congress had "wisely made the payment of the tax claimed * * * a condition precedent to a resort to the courts by the party against whom the tax is assessed" and that this rule "is neither arbitrary nor unreasonable." In *Phillips* v. *Commissioner*, 283 U.S. 589, 593-601 (1931), the Court rejected the taxpayer's contention that the summary procedure established by Congress

for collecting certain transferee liabilities was unconstitutional for failure to provide an opportunity for a judicial determination of liability at the outset. The Court stated that "[w]here, as here, adequate opportunity is afforded for a later judicial determination of the legal rights, summary proceedings to secure prompt performance of pecuniary obligations to the government have been consistently sustained" (*id.* at 595). The Court explained that this result was justified because, if it is important that the government need be satisfied immediately, "mere postponement of the judicial enquiry is not a denial of due process, if the opportunity given for the ultimate judicial determination of the liability is adequate" (*id.* at 596-597).

This Court has consistently observed that tax collection falls within this principle because of "the need of the government promptly to secure its revenues" (*Phillips* v. *Commissioner*, 283 U.S. at 596), and therefore due process is satisfied by a tax collection system that provides an "adequate" opportunity for a post-assessment judicial determination. See *G.M. Leasing Corp.* v. *United States*, 429 U.S. 338, 352 n.18 (1977); *Commissioner* v. *Shapiro*, 424 U.S. 614, 630-632 (1976); *Bob Jones University* v. *Simon*, 416 U.S. 725, 746-748 (1974); *Fuentes* v. *Shevin*, 407 U.S. 67, 91-92 & n.24 (1972); *Bull* v. *United States*, 295 U.S. 247, 260 (1935). Petitioner does not explain why the post-assessment remedy of a refund suit is not "adequate."[4]

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[4] If the later judicial proceeding is not adequate to remedy the harm to the responsible person, he may invoke the exception to the Anti-Injunction Act, 26 U.S.C. 7421(a) (see *Enochs* v. *Williams Packing Co.*, 370 U.S. 1, 7 (1962)), and attempt to demonstrate that the collection of the Section 6672 liability should be enjoined. This Court stated in *Commissioner* v. *Shapiro*, 424 U.S. at 633, that the availability of the limited prepayment remedy embodied in the *Williams Packing* exception establishes a standard "at least as favorable to the taxpayer as that required by the Constitution."

Here, petitioner was afforded the opportunity to contest his tax liability in a refund action in district court, and there is no allegation that he would not have been made whole in that action if a tax liability had been wrongfully assessed against him.[5]

Accordingly, the courts of appeals have unanimously rejected due process challenges to the assessment of Section 6672 liability without a prior hearing, thereby requiring the responsible person to pay the tax and seek a refund in order to obtain judicial review. See *Boynton* v. *United States*, 566 F.2d 50, 53 n.2 (9th Cir. 1977); *Kalb* v. *United States*, 505 F.2d 506, 510 (2d Cir. 1974), cert. denied, 421 U.S. 979 (1975); *Kelly* v. *Lethert*, 362 F.2d 629, 635 (8th Cir. 1966). The courts have reached the same conclusion in the analogous situation of the assessment of a "frivolous income tax return" penalty under Section 6702 of the Code, where judicial review of the validity of the penalty is available only post-assessment. See *Jolly* v. *United States*, 764 F.2d 642, 645-647 (9th Cir. 1985); *Kahn* v. *United States*, 753 F.2d 1208, 1217-1222 (3d Cir. 1985); *Anderson* v. *United States*, 754 F.2d 1270, 1272 (5th Cir. 1985); *Heitman* v. *United States*, 753 F.2d 33, 35 (6th Cir. 1984); *Baskin* v. *United States*, 738 F.2d 975, 977 (8th Cir. 1984); *Martinez* v. *Internal Revenue Service*, 744 F.2d 71, 72-73 (10th Cir. 1984). See also *Professional Engineers, Inc.* v. *United States*, 527 F.2d 597, 600 (4th Cir. 1975) (penalty for late filing); *Morse* v. *Internal Revenue Service*, 635 F.2d 701, 703 (8th Cir. 1980) (failure to receive deficiency notice, thus precluding suit in Tax Court, does not violate due process where refund suit is available); *Lewin* v. *Commissioner*,

[5] Indeed, since it has now been finally determined in a judicial proceeding that petitioner's Section 6672 liability was correctly assessed, it does not appear that he would be entitled to any relief here even if his constitutional objection to the assessment procedure were upheld. His procedural claim has thus been rendered merely academic.

569 F.2d 444, 445 (7th Cir.) (same), cert. denied, 437 U.S. 904 (1978); *Johnston* v. *Commissioner*, 429 F.2d 804, 806 (6th Cir. 1970) (same). Thus, the decision below is fully in accord with established law.

Petitioner's only proffered argument for unconstitutionality is the bare assertion that "[t]here is no reason * * * why the assessment of [a Section 6672] penalty like any other tax or penalty * * * should not be subject to issuance of a notice of deficiency and a right to review by the Tax Court, prior to payment" (Pet. 5). There is a reason, of course—namely, that the procedures for assessing and collecting taxes are prescribed by statute, and the Code clearly draws the distinction to which petitioner objects. Petitioner does not dispute that, while Congress has made the notice of deficiency procedure available for some taxes, it has not done so for a responsible person's Section 6672 liability. See Pet. App. A13-A14; I.R.C. §§ 6212, 6303, 6671. Accordingly, petitioner's suggestion that the procedure be extended to the latter situation is one that should be addressed to Congress; it casts no doubt upon the constitutionality of the existing system.[6]

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[6] We note that Congress has taken steps to minimize the extent to which a responsible person will be temporarily deprived of property pending judicial review of the correctness of an assessment of Section 6672 liability. Section 6672(b) of the Code provides that, if a taxpayer pays the "minimum amount required" to commence a refund action and posts an appropriate bond, the IRS is prohibited from attempting to collect the remaining amount of taxes owed. The "minimum amount" in these circumstances is generally considered to be the withholding taxes due for one individual for each quarter. See, *e.g.*, *Boynton* v. *United States*, 566 F.2d at 53 & n.3; *Steele* v. *United States*, 280 F.2d 89 (8th Cir. 1960); M. Saltzman, *IRS Practice and Procedure* ¶ 17.10[3], at 17-48 (1981). Thus, while petitioner chose not to avail himself of this opportunity, Section 6672 effectively provides a taxpayer with an opportunity for judicial review *prior* to paying most of his assessed tax liability, so long as he posts an appropriate bond.

CONCLUSION

The petition for a writ of certiorari should be denied.
Respectfully submitted.

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FEBRUARY 1990

☆ U.S. GOVERNMENT PRINTING OFFICE: 1989—262 203/0781